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First Amendment Cases in the 1998-99 Term: The Calm Before the Storm

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First Amendment Cases in the 1998-99 Term: The Calm Before the Storm

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THE CALM BEFORE THE STORM: FIRST AMENDMENT CASES IN THE 1998-99 TERM

Joel M. Gora*

Hon. Leon D. Lazer:

Thank you, Dean Kaufman. Our final subject is the First Amendment.¹ Our final speaker, who is a consistent participant in these conferences, is a professor at Brooklyn Law School with a profound background in the area of First Amendment liberties.

Professor Gora:

Thank you very much, Judge Lazer. Dean Kaufman is a very hard act to follow and that is a very tough introduction to live up to, but mercifully, I only have two cases to discuss so it will be relatively brief.

In 1998, the Supreme Court had the fewest number of First Amendment cases, as there were only two.² Then again in 1999 there were only two First Amendment cases.³ The cases in 1998 addressed some very controversial public issues. One case dealt with funding of the arts,⁴ which of course is now a front-page issue.⁵ The other case confronted the issue of whether minor

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¹ U.S. CONST. amend I. This amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

² *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that the statute requiring the NEA to ensure excellence and artistic merit by which grant applications are judged is not in violation of the First Amendment and the statute is not unconstitutionally vague); *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (holding an exercise of journalistic discretion in managing a non-public forum valid).

³ *Buckley v. American Constitutional Law Foundation Inc.*, 525 U.S. 182 (1999); *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999).

⁴ *Finley*, 524 U.S. at 572.

⁵ See *Brooklyn Inst. of Arts & Scis. v. City of New York & Rudolph W. Guiliani*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999); see also D.J. Gershon, *Constitutional Law: Mayor's Decision to Stop Funding the Brooklyn Museum Is Held Unconstitutional*, 222 N.Y.L.J. 88 (1999); Jack Achiezer Goggenheim,

political party candidates had to be included in televised debates.⁶ Of course, the spectre of Minnesota Governor, Jesse Ventura's, illuminating our political scene has caused a lot of concern. On the other hand, the two cases from 1999 were much calmer in terms of their political impact and this gives me the sense that the 1999 term is really a bit of a consolidating moment. If there were a prevailing theme I would describe it as the "calm before the storm" because this past term was rather modest with no new, major developments. The 2000 term, however, will be quite the opposite.

I. A BUCKLEY CASE

In 1962, the Court first placed its foot into what Justice Frankfurter called the "political thicket" of getting involved in applying the Constitution to the law of democracy.⁷ Since then, the Court has been actively involved with the constitutional aspects of the electoral system. The first of the cases I want to talk about is *Buckley v. American Constitutional Law Foundation*.⁸ This is not *the Buckley* case,⁹ this is *a Buckley* case; but it deals with electoral and election law issues.

The *Buckley* case dealt with petitions to put initiatives or referenda on ballots for statewide voting.¹⁰ Specifically, the case involved a number of restrictions that Colorado created for the placement of initiatives on the ballot.¹¹ Notably, this case was not

The Supreme Chutzpah, 222 N.Y.L.J. 91 (1999); Anthony Tommasini, *Amyas Ames Is Dead at 93; A Champion of Lincoln Center*, N.Y. Times Abstracts, Jan. 26, 2000; David Barstow, *Guiliani Ordered to Restore Funds for Art Museum*, N.Y. Times Abstracts, Nov. 2, 1999; Ralph Blumenthal, *City Administration Official Opposes Guiliani on Museum*, Oct. 9, 1999.

⁶ *Arkansas Educational Television Commission*, 523 U.S. at 669.

⁷ See *Baker v. Carr*, 369 U.S. 186 (1962) (holding that the reapportionment disputes were justiciable).

⁸ 525 U.S. 182 (1999).

⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁰ *Buckley*, 525 U.S. at 186.

¹¹ *Id.* The question addressed by the Court focused on three requirements of the Colorado initiative the requirements that "petition circulators be registered voters. . . , wear identification badges bearing the circulator's name. . . , and that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator." *Id.*

the first instance where Colorado was before the Court on such a matter.¹² Ten years earlier in *Meyer v. Grant*,¹³ Colorado had prohibited the employment of people, for money, to gather signatures on petitions for the placement of referenda on the ballot.¹⁴ The Supreme Court, unanimously, held that this prohibition violated the First Amendment.¹⁵ The Court noted that placing limitations upon the funding of petition gatherers resulted in limiting the gathering of petition signatures.¹⁶ Therefore, such a prohibition limits First Amendment activity.¹⁷

The Court in *Buckley* relied upon the reasoning advanced in *Meyer*, emphasizing this basic principle.¹⁸ While the Court stated that the issue of gathering signatures to put referenda on a ballot is at a divide between two kinds of electoral activities, ballot access and campaigning, it noted that the issue was similar to leafleting.¹⁹ The Court reasoned that this similarity was due to the fact that the petition gatherer was tendering a petition to a person, providing an explanation of the petition, asking for a signature and placing the matter on the ballot.²⁰ Moreover, the Court noted that leafleting is one of the most pristine, pure and fully protected First Amendment activities.²¹ On the other hand, the Court stated that to the extent that the effect of gathering these signatures would be to put a matter on the ballot, it involves more issues that the government might need to regulate.²² Hence, this area is really in conflict: the leaflet, pure and simple on the one hand, and the regulation of electoral, ballot, and governmental matters on the other hand.

The case also involved six requirements or limitations that Colorado had place upon petition gathering. Initially, there was an age requirement under which one could not be solicited by anyone

¹² See, e.g., *Meyer v. Grant*, 486 U.S. 414 (1988).

¹³ 486 U.S. 414 (1988).

¹⁴ *Id.*

¹⁵ *Id.* at 422-423.

¹⁶ *Id.* at 423

¹⁷ *Id.*

¹⁸ *Buckley*, 525 U.S. at 186.

¹⁹ *Id.* at 199.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 203-04.

under eighteen years old.²³ This solicitation was confined to a six-month period so it could not continue indefinitely.²⁴ Also, there had to be an affidavit with each batch of signatures that was gathered.²⁵ In addition to the gatherer's identity and address, the affidavit had to include the petition gatherer's signature stating under oath their familiarity with the ballot measure for which they were gathering signatures.²⁶ The lower courts upheld these three requirements and the Supreme Court denied the portion of the petition for certiorari that addressed those issues.²⁷ While the Court did not say that those three requirements were valid, the Court's refusal to review them was a pretty strong indication that the three requirements would be sustained.²⁸ Thus, an eighteen year age requirement, a six-month limitation, and an affidavit signed by the person seeking the signatures indicating that they are familiar with the content was permissible.²⁹

However, there were three petition requirements that were sharply at issue. First, petition circulators must be registered voters.³⁰ Second, signature gatherers must wear an identification badge that indicates if they are a volunteer or an employee.³¹ There must also be the periodic disclosure of the sponsors of the ballot question.³² The Supreme Court reviewed each of these issues.

In terms of the methodology employed by the Court, Justice Ginsburg basically stated that the Court would utilize an ad hoc approach.³³ There was no litmus paper test, nor any other clear-cut approach.³⁴ Rather, the Court's approach resembled a balancing

²³ *Buckley*, 525 U.S. at 188.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 190.

²⁸ *Id.*

²⁹ *Id.* at 188-89.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 188. The initiative required "on a monthly basis, the names of the proponents, the name and address of each paid circulator, the name of the proposed ballot measure, and the amount of money paid and owed to each circulator during the month." *Id.*

³³ *Buckley*, 525 U.S. at 192.

³⁴ *Id.*

methodology.³⁵ Justice Ginsburg wrote that the goal was to make sure that the requirements did not unduly restrain the ability of groups to circulate the petitions, obtain signatures and present them to the voters.³⁶ Utilizing this as a benchmark, Justice Ginsberg stated that each restriction must be examined on its own basis.³⁷

Interestingly, Justice Thomas's concurring opinion indicated that there should be an application of strict scrutiny to all of these restrictions because they limit the ability of people to put out their message and to use the ballot to do so.³⁸ However, the Court declined to take Justice Thomas's approach. The majority indicated that while its approach was consistent with the strict scrutiny that Justice Thomas had advocated, it was not a synonymous approach.³⁹ Consequently, each of the three requirements was invalidated.⁴⁰

Utilizing its own approach, the Court invalidated the requirement that petition circulators be registered voters.⁴¹ The Court emphasized that such a requirement would prevent the involvement of five hundred thousand to one million Colorado residents.⁴² This would result in a diminution of speech associated with seeking the necessary signatures on a petition to put a question on the ballot.⁴³ Moreover, the restriction would limit the number of voices that could be heard.⁴⁴ Finally, the restraint limiting circulation to registered voters was well overbroad in terms of the legitimate state interests in preventing voter fraud and duress.⁴⁵

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Buckley*, 525 U.S. at 206. (Thomas, J., concurring). The standard of strict scrutiny will be used to determine if a statute is constitutional if there is both a compelling state interest and sufficiently narrowly tailored means. *Id.*

³⁹ *Id.* at 192.

⁴⁰ *Id.* at 187.

⁴¹ *Id.* at 195-96 (noting that the ease of registration misses the point that some petition circulators may choose not to register as a matter of political expression).

⁴² *Id.* at 193.

⁴³ *Id.*

⁴⁴ *Id.* at 197 (finding the residency requirement would unduly restrict the number of message carriers in the "ballot-access arena").

⁴⁵ *Id.* at 194-95.

It is important to note that the Court failed to resolve the following question discussed by the lower courts: persons must be registered voters in order to solicit these signatures, and whether these persons must be residents of the state.⁴⁶ The Court also left open whether a residency requirement would be vulnerable. Between the lines, however, there is an indication that the Court would be favorably inclined toward a residency requirement, even though it struck down a registered voter requirement.⁴⁷

The second restriction the Court addressed was the requirement that people gathering signatures for petitions wear badges identifying themselves, stating their name, as well as indicating whether they were paid or volunteer-petition-signature gatherers.⁴⁸ The Supreme Court likened this to the requirement that leafleters wear identification badges.⁴⁹ The Court essentially stated that an identification requirement presented too much of a chill on the ability of the people to gather signatures on petitions.⁵⁰ As a result, the name tag restriction was struck down.⁵¹

This case was similar to *McIntyre v. Ohio Elections Commissions*,⁵² where the Supreme Court upheld the right of political anonymity and struck down the requirement that anyone handing out a leaflet had to print their name on the leaflet.⁵³ In striking such a requirement, the Court stressed its fear that placing a nametag on one's message may lead to problems, especially if the message is controversial.⁵⁴ For example, soliciting signatures to put a legalizing marijuana ballot question or a restricting abortion question may likely result in harassment against by those wearing the name tag.⁵⁵

Finally, the Supreme Court rejected the idea that it is necessary to require periodic disclosure by the sponsors of a ballot question

⁴⁶ *Id.*

⁴⁷ *Buckley*, 525 U.S. at 197.

⁴⁸ *Id.*

⁴⁹ *Id.* at 199.

⁵⁰ *Id.*

⁵¹ *Id.* at 200.

⁵² 514 U.S. 334 (1995).

⁵³ *Id.* at 357.

⁵⁴ *Id.*

⁵⁵ *Id.* at 342.

who were paying people to go out and solicit signatures.⁵⁶ The Court emphasized that the interest in preventing fraud could be dealt with in less restrictive ways.⁵⁷

The Court was quite clear in its decision and the vote on striking the registered voter requirement was unanimous. Moreover, the vote on striking the nametag and the disclosure requirements was six to three on each issue, with Justice Thomas joining the majority result only.⁵⁸ Justices O'Connor, Breyer and Rehnquist dissented on some of the questions, taking the position that although they went along with striking the registered voter requirement as a direct interference with the ability to have people put out the message, the disclosure requirement did serve the interest in preventing fraud.⁵⁹

I believe that this case breaks no new ground. The case does articulate that certain clear ballot petitioning procedures are impermissible: a nametag, a registered voter limitation, and a required disclosure of solicitor names afterwards. However, the case left unanswered those important questions of whether a residency requirement would be permissible, in addition to whether some form of identification stating whether one is a paid solicitor is permissible.

II. *Greater New Orleans Broadcasting Association v. United States*

The next case that I would like to discuss is *Greater New Orleans Broadcasting Association v. United States*, a commercial speech case.⁶⁰ The commercial speech doctrine was established in *Bigelow v. Virginia*,⁶¹ where the Court, for the first time, struck down a statute which restricted a newspaper advertisement for services.⁶² The advertisement was for abortion services and it

⁵⁶ *Buckley*, 525 U.S. at 204.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 659.

⁶⁰ *Greater New Orleans Broadcasting Association v. United States*, 119 S.Ct. 1923 (1999).

⁶¹ 421 U.S. 809 (1975).

⁶² *Id.* at 830.

appeared in a state where abortions were illegal.⁶³ However, abortion services were legal in the state where the abortions were to be performed.⁶⁴ The Supreme Court held that the communication of lawful truthful information could not be automatically restrained on the ground that it was for a commercial purpose for goods or services.⁶⁵ Since *Bigelow*, the Court has entertained approximately twenty to twenty-five cases in the commercial speech area, invalidating most of the restraints.

Greater New Orleans Broadcasting Association v. United States was no exception.⁶⁶ This case addressed the status of the federal ban on broadcast advertising for lotteries or casino gambling.⁶⁷ This is worth mentioning, because historically, there was a time when there was a ban on broadcasting for lotteries, casinos and other items.⁶⁸ Additionally, there was a time when there was a total, country-wide ban on such activity, except for Las Vegas, Reno and one or two other places. Gambling was illegal, so advertising for gambling was illegal. However, throughout the past few years, gambling has become legal in many states. Nevertheless, there remain a number of restraints on advertising of gambling, particularly those utilizing broadcast media.⁶⁹

As a result, the Court had to deal with a statute that banned broadcast advertising of casino gambling or lotteries.⁷⁰ In *Greater*

⁶³ *Id.* at 811-12.

⁶⁴ *Id.* at 812.

⁶⁵ *Id.* at 818.

⁶⁶ 119 S. Ct. 1923 (1999).

⁶⁷ *Id.* at 1926.

⁶⁸ *Id.* (citing Act of Mar. 1895, 28 Stat. 963 (which prohibited the transportation in interstate or foreign commerce and the mailing of, tickets and advertisements for lotteries and similar enterprises); Act of Mar. 2, 1827, § 6, 4 Stat. 238 (restricting the participation of postmasters and assistant postmasters in the lottery business); Act of July 27, 1868, § 13, 15 Stat. 196 (prohibiting the mailing of any letters or circulars concerning lotteries or similar enterprises); Act of July 12, 1876, § 2, 19 Stat. 90 (repealing an 1872 limitation of the mails prohibition to letters and circulars concerning illegal lotteries); Anti-Lottery Act of 1890, § 1, 26 Stat. 465 (extending the mails prohibition to newspapers containing advertisements or prize list for lotteries or gift enterprises)).

⁶⁹ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (setting forth the four-part test for measuring restrictions on commercial speech).

⁷⁰ *Id.* at 1927. The statute addressed by the Court can be found at 18 U.S.C. § 1304 (1934).

New Orleans Broadcasting Ass'n, broadcasters were advertising in the New Orleans Metropolitan area where these activities were legal.⁷¹ However, the broadcast extended into Texas and Arkansas, where casino gambling and lotteries were illegal.⁷² The United States claimed that the advertisements could be prohibited because of the illegality of gambling in Texas and Arkansas.⁷³ In this case, there was also an effort by some of the trade and advertising groups to get the Court to abandon the four-part test for measuring restrictions on commercial speech and adopt a stricter approach.

This four-part test had previously been developed in a 1981 New York case called *Central Hudson v. Public Service Commission of N.Y.*⁷⁴ At the outset, there must be a threshold determination of “whether the expressions were protected by the First Amendment.”⁷⁵ This determination requires four considerations. To begin, “for commercial speech to come within this provision it must concern lawful activity and not be misleading.”⁷⁶ Second, one must ask “whether the asserted governmental interests in restraining the speech are substantial.”⁷⁷ Third, “if both inquiries yield positive answers, one must determine whether the regulation directly advances the governmental interests asserted,” and finally whether it is not more extensive than is necessary to attain that interest.”⁷⁸ This is the careful tailoring requirement.

Utilizing this four-part test, the Court has struck down most of the commercial advertising bans and restraints that have come before it. Nevertheless, there is a movement to get the Court to abandon that test and replace it with the rule that commercial speech is free speech and cannot be restrained except for the issue of falsity. Despite this movement, the Court has expressly declined to do so.

The *Central Hudson* test was applied to invalidate the ban on broadcasting of gambling information from states where gambling

⁷¹ *Id.* at 1928.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 447 U.S. 557 (1980).

⁷⁵ *Greater New Orleans Broadcasting Ass'n*, 119 S.Ct. at 1930.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

was not illegal.⁷⁹ The Court conceded that the governmental interest in deterring gambling was substantial. However, the Court said the government does not exactly pursue a coherent policy in this area, to the extent that there is a great deal of gambling that is allowed.⁸⁰ However, the way in which the government could pursue such a purpose was essentially riddled with exceptions.

The Court listed a number of ways in which the government permitted advertising of gambling.⁸¹ In-state lotteries could advertise on radio or television, which is why we know the phrase, "You've Got To Be In It To Win It." Furthermore, Indian tribes, tribal casinos and tribal-owned casinos could lawfully advertise, certain government-owned casinos could advertise and lotteries run by charities could also advertise.⁸²

This created a situation where everybody could advertise gambling, except those who sponsor private casino gambling. As a result, the Court stated that in that kind of "Swiss cheese" regulatory world, in a world where, in the Court's phrase, "the law is as 'pierced with exceptions,'" the regulatory scheme failed the final element of the four-part test: the interest may be substantial, but the regulatory fit was almost irrational."⁸³

Based upon this reasoning, the Court concluded that a ban on only certain kinds of gambling advertising, which was enforced in only certain kinds of ways, failed the narrowly tailored requirement and did not advance the government's objective.⁸⁴

The doctrine that the government has to regulate the First Amendment area in a consistent and coherent fashion is not only important for measuring government regulations of commercial speech, but also has become important for measuring other kinds of government regulations of speech.

Moreover, when the government goes to court, be it the federal, state or local government, seeking to prohibit a certain kind of message and yet permits many other similar messages for media

⁷⁹ *Id.*

⁸⁰ *Id.* at 1931.

⁸¹ *Id.* at 1933.

⁸² *Id.*

⁸³ *Id.* at 1923.

⁸⁴ *Id.* at 1933.

communication to be aired, the government has a burden to justify why it is only regulating the defendant.

This is not to be referred to as a sort of an “underbreadth” doctrine, but rather as a theory of underinclusiveness. The issue is if there are such harms in communicating information about gambling, then why have so many forms of that communication been permitted to occur?⁸⁵ Moreover, in the area of business regulation, you remember the old saying “one step at a time,” the government is allowed to regulate “one step at a time.” The Court has increasingly stated that “one step at a time” does not get the job done in the area of commercial speech.

Furthermore, if some speakers are regulated while others are not, when the speech is essentially the same, then at the very least there has been a violation of the principle that one must naturally be pursuing the goals that one seeks to advance.

The aforementioned cases dealing with commercial speech and with the regulation of political activity are the two major cases last term that address the regulation of free speech activity.⁸⁶ The outcome of these cases was not surprising.

III. FIRST AMENDMENT ABSTINENCE

There are three cases in which the First Amendment prevails that demand brief attention. There were no cases where the First Amendment did not prevail, so the score is three to nothing. Nevertheless, these are cases where I view the Court as having basically abstained on the First Amendment issue. Let me just briefly explain what this statement means by an analysis of the three cases.

The first case, *Reno v. American-Arab Anti-Discrimination Committee*,⁸⁷ began as a major First Amendment case. The case represented an effort by the federal government to deport a number of people from the Middle East who were here on visas and other type of temporary statuses.⁸⁸ The government claimed the

⁸⁵ New Orleans, 119 S. Ct. at 1933.

⁸⁶ See *id.*; see also *Central Hudson v. Public Service Communications*, 447 U.S. 557 (1980).

⁸⁷ 119 S. Ct. 936 (1999).

⁸⁸ *Id.* at 939-40.

individuals were involved in advocating communism among other kinds of acts.⁸⁹ Based upon this claim, the government argued that the individuals could be deported.⁹⁰ The case began when Attorney General Edwin Meese was the Attorney General, and reached the Supreme Court for a full decision not on the merits in 1999.⁹¹ However, the case was a major First Amendment case with a detailed lower court opinion from the Ninth Circuit decision.⁹² Since it came from that liberal circuit, one ought not be surprised at the opinion's vindicating First Amendment rights for people to join all kinds of organizations, even ones allegedly subversive and vindicating as well the First Amendment rights of people who were only temporarily on our shores.

In any event, the case was going to be an important one for the determination of one's right to join a controversial organization. In addition, it was important for the full First Amendment protection of aliens temporarily residing in America. While the case was being litigated in the Ninth Circuit, Congress passed a major revision of the immigration laws and procedures.⁹³ The effect of the revision was to deny anticipatory federal court review of deportation matters, even though the effort to seek federal review was based on a claim that the deportation itself was a violation of the First Amendment.⁹⁴

In a lengthy and convoluted opinion, Justice Scalia, writing for the Court, stated that it is not necessary to reach these First Amendment issues, as Congress has precluded the Court from doing so.⁹⁵ Thus, a case that started out as a First Amendment case became a federal courts case.

⁸⁹ *Id.*

⁹⁰ *Id.* at 939.

⁹¹ *Id.* at 936. Since the initiation of the deportation proceedings in 1987, the case "made four trips through the District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit." The Ninth Circuit decided the case on the merits in 1995. *Id.*

⁹² See *Ampator v. Reno*, 170 F.3d 1269 (9th Cir. 1999).

⁹³ The revision passed by Congress was the Illegal Immigration Reform and Immigration Responsibility Act of 1996, 110 Stat. 3009-546, which repealed a former judicial-review scheme and created a more restrictive scheme, codified in 8 U.S.C. § 1252 (1994 ed., Supp. III). *Id.*

⁹⁴ *American-Arab Anti-Discrimination Committee*, 119 S. Ct. at 938-40.

⁹⁵ *Id.* at 936.

Several concurring opinions stated that if the Court thought that there was truly a First Amendment threat, then the Court might be willing to carve out an exception to the rule precluding federal review of these matters.⁹⁶ However, the concurrence found no evidence of a strong First Amendment threat, and consequently supported the preclusion of judicial review.⁹⁷ As a result, I think that this case represents an instance where the Court has abstained on the First Amendment issue.

The second case to illustrate the Court's abstinence involved a cause of action for severe peer sexual harassment.⁹⁸ However, on the other side of this issue, and one of the points that animated the quite passionate dissenters, was the proper interpretation of Title IX,⁹⁹ and whether schools had notice of their potential liability under these circumstances.¹⁰⁰ One minor, yet important, aspect of the case was that sexual harassment often takes the form of verbal interactions between teachers and students, or as in this instance, by one student to another.¹⁰¹

There was a significant amount of concern expressed in the dissenting opinion that the rule announced might have some untoward free speech consequences.¹⁰² These consequences could possibly require, coerce, or pressure school boards to clamp down on any kind of student-to-student speech that might be viewed as sexist or racist, in order to avoid liability.¹⁰³

⁹⁶ *Id.* at 947-52 (Ginsburg, J., concurring) (Breyer, J., concurring in part and concurring in the judgment).

⁹⁷ *Id.* at 947.

⁹⁸ *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999). In *Davis*, a fifth-grade student's parent sued the school board and officials under Title IX, alleging the failure to remedy the classmate's sexual harassment of the student. The issue in the case was whether "a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment." *See id.* at 1661-71.

⁹⁹ *Id.* at 1677 (1999). One of the petitioner's claims was a claim asserted under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. §1681 et. seq.

¹⁰⁰ *Id.* at 1678.

¹⁰¹ *Id.* at 1661.

¹⁰² *Id.* at 1677.

¹⁰³ *Id.*

There is a large difference between a dirty harsh word and an epithetic exchange among two students in a schoolyard, and the kind of overt and massive discrimination at the other end of the spectrum. However, the dissent was worried that the school boards would feel pressure to be as restrictive as possible of students' speech in order to avoid liability.¹⁰⁴ Moreover, the dissent was concerned that the school boards would find themselves caught in the middle between wanting to prevent the harassment from occurring and wanting to avoid violations of free speech or due process rights of the students accused of such behavior or such expression.¹⁰⁵

Again, the *Davis* case was one in which the Court abstained from addressing the First Amendment. Thus, while the dissenters were certainly concerned about the First Amendment as part of their theme, the case essentially turned on federalism and interpretations of Title IX.¹⁰⁶

The third of the abstention cases, the so-called "ride-along cases" derive from those instances where the police have invited members of the media to ride along during the execution of a search warrant.¹⁰⁷ For instance, in *Wilson v. Layne*, the Supreme Court held when the police permit the "ride alongs," the persons whose homes are invaded by the police and the press are entitled to sue the police for violating their Fourth Amendment rights by including the press and thereby going beyond the scope of the search.¹⁰⁸

One of the arguments made to justify allowing the ride-alongs was that the First Amendment both permitted and indeed required full reporting about the criminal justice system.¹⁰⁹ The Court agreed and cited cases where the press could not be punished for

¹⁰⁴ *Id.* at 1661.

¹⁰⁵ *Id.*

¹⁰⁶ Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 et. seq.

¹⁰⁷ See e.g., *Wilson v. Layne*, 119 S.Ct. 1692 (1999) (holding that bringing reporters into a homeowner's home during an attempted execution of a search warrant violated the Fourth Amendment is prohibition against unreasonable searches).

¹⁰⁸ *Id.* at 1699.

¹⁰⁹ *Id.* at 1698.

reporting information about the criminal justice process.¹¹⁰ However, the Court stressed that it is not permissible to overcome an individual's right in order to advance the First Amendment.¹¹¹ Hence, even though there is generally a First Amendment interest in reporting police behavior and activity, this interest cannot supercede the very specific homeowner's interest in the non-occurrence of having a search recorded for posterity.¹¹²

A final case where the Court abstained from confronting First Amendment issues was the Chicago loitering case.¹¹³ This case addressed the issue of whether "Standing on a Corner Watching All of the Girls Go By" was a protected right or just the name of a song.¹¹⁴ This case was a possible First Amendment case because the loitering ordinance was overbroad, as it could be used to keep groups from congregating for political purposes.¹¹⁵ Historically, loitering statutes were frequently used by police to instruct leafletters or protesters to move on.

A very strong First Amendment argument was advanced in the case.¹¹⁶ However, in the Court's opinion the contention really received rather short thrift, perhaps accurately so. The Court stated that it would be more concerned about the overbreadth of this anti-loitering ordinance if the Court believed that it really interdicted First Amendment activity--namely, leafleting, speech and assembly for political purposes.¹¹⁷ However, there was no evidence whatsoever in the record that the ordinance was used to interdict First Amendment activity, therefore the Court refused to apply First Amendment doctrine.¹¹⁸

Furthermore, the Court noted that to the extent there was any First Amendment activity at all, such activity consisted merely of

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999).

¹¹⁴ *Id.* at 1857.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1856. The argument that was made was that the "ordinance impaired the freedom of assembly of non-gang members in violation of the First Amendment to the Constitution and Article I of the Illinois Constitution and that it was unconstitutionally vague." *Id.*

¹¹⁷ *Id.* at 1857.

¹¹⁸ *Id.*

the right to “hang out” and the right to assemble for nonpolitical purposes.¹¹⁹ The Court went on to say that this case was a due process vagueness case, and emphasized that due process was violated by the lack of notice and lack of standards that were given by the ordinance.¹²⁰ Again, this case represented another example where the Court showed itself inclined not so much to duck, but to avoid altogether grappling with First Amendment issues, unless absolutely necessary to the resolution of the case.

The upcoming theme for the Court this coming term is one of “you can run but you cannot hide,” because there is a number of First Amendment cases that are both quite provocative and pertinent to First Amendment law. There are two cases in particular that underscore this theme.

The first case, entitled *The Board of Regents at the University of Wisconsin v. Southworth*,¹²¹ will confront with the issue of mandatory student activities fees, an issue that has been around for twenty years. In this case, Wisconsin required all the University students to pay one hundred sixty five dollars per year for student activities fees and then allocated the fees to a number of student groups, which I think it fairly can be called political, or other groups that espouse viewpoints that some students may not have agreed with.¹²² The disagreeing students filed suit, taking the position that the University was forcing individuals, by utilizing student activities fees, to subsidize the messages of other student groups, regardless of whether the individual supports the group’s message.¹²³ Hence, they alleged that this procedure constitutes a violation of the right not to be compelled to support speech of which one disapproves.¹²⁴

¹¹⁹ *Id.* (citing *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), which held that teenage dancing did not involve the right to associate under the First Amendment and therefore could be banned).

¹²⁰ *City of Chicago*, 527 U.S. at 1852.

¹²¹ 151 F.3d 717 (7th Cir. 1998), *cert. granted*, 119 S.Ct. 1332 (1999).

¹²² *Southworth v. Grebe*, 151 F.3d 717, 719 (1998).

¹²³ *Id.* at 718.

¹²⁴ *Id.* at 735. Specifically, the students alleged violations of First Amendment rights offends speech and association, as well as rights under the Religious Freedom Restoration Act and reviews other state laws. *Id.* at 18.

Previously, the Court has upheld this right in the context of union members and government employees.¹²⁵ The question now is whether the Court will uphold the right in the context of university students? This issue is obviously an important one for both university administrators and college administrators.

The supporters of the student activity fees advanced arguments based upon a 1995 case where the Court held that there was no violation of the Establishment Clause where a university used funds to subsidize student groups.¹²⁶ The University used the funds for various organizations, including religious student groups.¹²⁷ Aligning this case with the present one, the supporters here too argue that, just because university funds are being used to subsidize speech does not mean that such speech constitutes the university's speech. Furthermore, this use of funds does not mean that the people disagreeing with such speech are having their rights violated. It will be interesting to see how the Court will resolve the case.¹²⁸

The second case, *Nixon v. Shrink Missouri Government PAC*,¹²⁹ deals with today's C-SPAN debate on campaign finance reform.¹³⁰ In this case, the Eighth Circuit invalidated a State of Missouri statewide campaign contribution limit of one thousand dollars that Missouri had imposed about five years ago, prior to which there were no contribution limits in Missouri.¹³¹ The Eighth Circuit stated that before there can be an imposition of contribution limits, which restrict the candidate's speech, there must be a demonstration that there is a problem with large contributions in the state.¹³² Moreover, a one thousand-dollar limit on contributions

¹²⁵ See *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

¹²⁶ See *Rosenburg v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

¹²⁷ *Id.* at 822.

¹²⁸ The Court agreed that the use of student fees to fund a wide variety of special educational activities does not violate the First Amendment. See *Board of Regents of the University of Wisconsin System v. Southworth*, 120 S. Ct. 1346 (2000).

¹²⁹ No. 98-963, 2000 WL 48424 (U.S. Jan 24, 2000).

¹³⁰ *Id.* at *1.

¹³¹ *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 523 (8th Cir. 1998).

¹³² 161 F.3d at 521-22.

does not buy much anymore in terms of speech *or* influence.¹³³ Therefore, the Eighth Circuit struck down the thousand-dollar limit on campaign contributions, as it failed the strict scrutiny test.¹³⁴ The Supreme Court agreed to hear the case, and consequently heard argument one week ago. In any event, by the end of the term, we will know whether the theme of “unlimited spending but limited giving” will continue, or whether the Court will use that case as a way of revisiting the original *Buckley* case by saying that if spending limits are bad, then giving limits are no better.¹³⁵

Another case worth mentioning is called *Los Angeles Police Department v. United Reporting Publishing Corporation*.¹³⁶ This is a very important commercial speech case. The case involves a restriction on the police department preventing it from communicating the names of arrestees to the public.¹³⁷ However, there is an exemption, as the names can be reported to certain members of the public for educational and other similar purposes.¹³⁸

However, as the casino advertising case stated, “one cannot have a scheme riddled with exceptions.”¹³⁹ Is the *Los Angeles Police Department* riddled with exception? The Court will have to tell us. This case will also provide an occasion to decide the issue of whether using information for political or educational purposes affords one greater protection, while using it only for commercial purposes mailing to arrestees to sell them a new lawyer is subject to lessor scrutiny. Moreover, the issue that the Court refused to deal with in the casino advertising case-- whether to abandon the four-part test and adopt a higher standard of scrutiny for commercial speech -- will be addressed in the *Los Angeles Police Department*.¹⁴⁰

¹³³ *Id.*

¹³⁴ *Id.* at 522-23.

¹³⁵ The Court upheld the *Buckley* approach, i.e. spending limits are bad, giving limits are good. *See, Nixon*, 120 S. Ct at 897.

¹³⁶ 120 S. Ct. 483 (1999).

¹³⁷ *Id.* at 486-87.

¹³⁸ *Id.* at 486.

¹³⁹ *See Greater New Orleans*, 119 S. Ct. at 1923

¹⁴⁰ Here, too, the Court finally rejected a First Amendment claim, ruling that the government had simply denied access to this information, a less direct free speech problem. *See Los Angeles Police Department*, 119 S. Ct. at 489.

There are additional cases that deal with nudity and pornography that are worth mentioning. One case that deals with the issue of whether communities can ban live nude dancing implicates the 1991 Supreme Court case entitled *Barnes v. Glen Theater*.¹⁴¹ In this case, the Court held that communities could ban live nude dancing in bars and other places, but the decision was three to two to three to one.¹⁴² Since this decision, there has been a great deal of personnel change within the Court, so the Court will revisit the issue.¹⁴³

Finally, there are three other cases that I will briefly note. One case involves pornography and is entitled *United States v. Playboy Entertainment Group, Inc.*¹⁴⁴ The main issue in the case is the extent to which cable operators offering the Playboy Channel have to either carry such fare after midnight when there are less children watching, or completely scramble the signal in order to prevent "signal bleeding."¹⁴⁵ In this case, the Court will once again revisit the issues of not only whether in the First Amendment family of free speech there is greater speech and lesser speech, but also whether the lesser speech is subject to greater regulation.¹⁴⁵

Another case to be resolved, *Hill v. Colorado*,¹⁴⁷ involves abortion clinic demonstrations. In the past, the Court has dealt with this issue on two occasions,¹⁴⁸ with both concerning injunctions against demonstrations and sidewalk counseling of people entering or leaving abortion clinics.¹⁴⁹ Now the Court is

¹⁴¹ 501 U.S. 560 (1991).

¹⁴² *Id.* at 580-81.

¹⁴³ The Court did revisit the issue, and reached the same conclusion that communities can ban live nude dancing. See *City of Erie v. Pap's A.M.*, TDBA "Kandyland," 120 S. Ct. 1382 (2000).

¹⁴⁴ 945 F. Supp. 772 (D. Del. 1996), *cert. granted*, 119 S.Ct. 2365 (1999).

¹⁴⁵ 945 F. Supp. at 774. Signal bleeding is a technical term meaning that one watching a cable television station can see a little and hear a little even if one is not subscribing. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 973 P.2d 1246 (1999).

¹⁴⁸ See *Schenck v. Pro Choice Network of Western New York*, 519 U.S. 357 (1997) and *Bray v. Alexandra Women's Health Clinic*, 506 U.S. 263 (1993).

¹⁴⁹ COLO. REV. STAT. ANN. §18-9-122 (West 1999). This statute provides:

(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the

faced with a Colorado statute restricting such activity anywhere within one hundred feet to the entrance of an abortion clinic.¹⁵⁰ What is new about this case is that it is a statute not an injunction. One must wait and see whether this will make any difference in the outcome.

The final case is *Mitchell v. Helms*.¹⁵¹ The issue is whether the New Orleans School Board, in receiving federal funds for education, can make those funds available for the purchase of

exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

Id.

¹⁵⁰ *Id.*

¹⁵¹ 151 F.3d 347 (5th Cir. 1998), *cert. granted*, 119 S.Ct. 2336 (1999).

computers and other educational resources to private schools, including religious parochial schools.¹⁵²

For a long time in the church and state debate, the Court has basically stated that government can provide certain benefits and facilities to all schools, including religious schools, but cannot provide instructional materials.¹⁵³ The *Mitchell* case involves computers, which of course can be used for secular research and education and learning, but can also be used for sectarian research, education and learning.¹⁵⁴ The challengers in the case claim that this provision violates church and state separation because the government is funding the computers.¹⁵⁵

The Supreme Court will ultimately have to decide the issue, but lurking behind this issue is the biggest issue of all: vouchers. This issue is one of the biggest political issues to confront the Court. Moreover, depending upon how the Court decides *Mitchell v. Helms*, the voucher issue may become one of the biggest constitutional issues ever: namely, whether the government can give vouchers for educating children and whether those vouchers can be used in public schools, private schools or parochial schools. It certainly will be an interesting Term. Thank you very much.

¹⁵² *Id.* at 356.

¹⁵³ *Agostini v. Felton*, 117 S. Ct. 1997, 2003 (1997).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

